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No. 00-522

IN THE

Supreme Court of the United States

PAPPAS TELECASTING OF SOUTHERN CALIFORNIA, L.L.C.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The 12-page brief of respondents' opposing review ("Opp. Br.") is more notable for what it omits than what it asserts. Respondents do not dispute that, under Section 308 of the Communications Act, 47 U.S.C. § 308, the Federal Communications Commission (the "Commission") may grant station licenses or modifications thereof "only upon written application therefor" except in cases of emergency or war. Pet. App. 30a. Nor do respondents dispute that the court of appeals accepted with virtually no scrutiny the Commission's claim that its action on April 3, 1997 to issue hundreds of digital television ("DTV") station licenses without first having received written applications for those licenses was merely an exercise of the agency's authority to "modify" existing licenses under Section 316 of the Communications Act for which, *it contends*, no written applications were required.[1]

As noted in the petition for a writ of certiorari, the Commission's mass "issuance" of hundreds of new and technologically distinct DTV authorizations cannot reasonably or fairly be termed a "modification" of existing analog licenses, and, in any event, neither the agency nor the court of appeals explained why the Commission's action qualified as a "modification" under Section 316 (requiring no written application), but not as a "modification" under Section 308 (which does require written application).

Rather than address those points directly, respondents invite this Court to disregard the inconsistency between the Commission's action and Section 308 because this matter "involves an initial licensing program for DTV that will not recur" and because petitioner's suggested reconciliation between Section 308 and Section 316 "was not presented below and the court of appeals did not consider it." Opp. Br. 8, 10.

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1. 47 U.S.C. § 316(a)(1) ("Any station license or construction permit may be modified by the Commission . . . .") Pet. App. 32a.

This Court should decline respondents' invitation and should grant the petition, because the decision below creates substantial uncertainty regarding the scope of the Commission's authority to implement sweeping changes to the structure and distribution of broadcast licenses under the guise of its power to "modify" existing licenses under Section 316 of the Communication Act, a question that extends well beyond the DTV licensing program (significant in its own right). Respondents' claim that the court of appeals did not consider petitioner's proposed reconciliation of Section 308 and Section 316 fails to recognize that it was the court of appeals' reliance on Section 316 to justify the Commission's action that gave rise to the inconsistency with Section 308's "written application" requirement in the first place, an inconsistency petitioner did point out below. Moreover, the Commission's purported exercise of this "modification" authority, insofar as it denied petitioner the award of a paired DTV channel, failed to comport with the requirements of due process, and a remand is warranted on that ground alone.

I. THE COMMISSION'S ACTIONS VIOLATED SECTION 308's WRITTEN APPLICATION REQUIREMENT.

In establishing the administrative structure set forth in the Communications Act, Congress considered the requirement for a written application for station licenses to be sufficiently important to mandate this requirement not only for grants of such licenses, but also for "modifications" and "renewals" of those licenses. 47 U.S.C. § 308(a); Pet. App. 30a. Further, Congress permitted the Commission to dispense with a formal application only in the narrowest of circumstances — specified cases of "emergency" or "war" — and limited the duration of any authority granted without application (whether an initial license issuance, modification, or renewal) to the duration of the "emergency or war requiring it." *Ibid.*

Respondents urge this Court to accept the Commission's refusal to follow Congress' explicit direction in Section 308 as a reasonable interpretation of the statute entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Opp. Br. 9. However, an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1297 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). There is simply nothing in the structure of the Communications Act that permits the Commission to by-pass the written application requirement of Section 308 in issuing hundreds of new authorizations to broadcast DTV signals. Nor does labeling these new authorizations "modifications" excuse the Commission's failure to follow Congress' direction here.

A. The Commission's Action Was Not A Mere "Modification" Of Existing Licenses.

In *MCI Telecomm. Corp. v. American Tel. & Telegraph Co.*, 512 U.S. 218 (1994), this Court rejected a similar effort by the Commission to excuse a wholesale departure from the structure of the Communications Act by calling it a mere "modification." This Court held in *MCI* that the Commission's decision to eliminate the tariff requirements of 47 U.S.C. § 203 was not, as the agency contended, a valid exercise of its authority to "modify" such requirements, but rather was an unauthorized "basic and fundamental change[ ]" to the statutory scheme that could only be undertaken by Congress. 512 U.S. at 225.

The court of appeals and the respondents dismissed the relevance of *MCI* here, asserting that all television broadcasters (both those that were granted paired DTV licenses and those that were not) "will begin and end the

transition period broadcasting television programming to the public under very similar terms." Pet. App. 15a; Opp. Br. 11. Respectfully, this sweeping statement illustrates more clearly than any argument the failure of the court of appeals and the respondents to acknowledge the scope and impact of the Commission's blanket "issuance" of DTV broadcast licenses on April 3, 1997.

As respondents point out, DTV entails the introduction of an entirely new television technology, and viewers accordingly will be required to purchase special equipment (next-generation television sets or converter boxes) to receive the new digital signals. Opp. Br. 2. The conversion of the current base of tens of millions of analog television receivers to digital receivers will require a "massive investment" and will take many years to complete. Pet. App. 3a. For this reason, the Commission recognized the need for a transition period, during which broadcasters would be able to operate two channels, one transmitting analog signals that can be received on existing analog equipment, and a second channel (a "paired" channel) on which to transmit digital signals that can only be received on equipment conforming to the new DTV standard. *Ibid.* At the end of the transition period, all television signals must be transmitted using the DTV standard, and each licensee will be required to return one of its two paired channels to the Commission. *Ibid.*

In this context, the issuance by the Commission of a paired DTV channel to analog broadcasters goes far beyond "modifying" existing licenses, under either Section 316 or Section 308. It is the grant of a valuable, new entitlement that will place incumbent broadcasters in a substantially better competitive position than those, such as petitioner, who must make do with a single channel during the transition period. A broadcaster without a paired DTV channel faces the untenable choice of isolating its programming from the vast majority of the viewing audience (by operating its single

channel as a digital facility) or sacrificing for several years the truly remarkable advantages offered by the new digital medium (by operating its single channel as an analog facility).[2] As this Court memorably observed in *MCI*, "[i]t might be good English to say that the French Revolution 'modified' the status of the French nobility — but only because there is a figure of speech called understatement and a literary device known as sarcasm." 512 U.S. at 228. For the Commission and the court of appeals to characterize as a "modification" the grant to a select class of broadcasters of a whole new species of license represents a similar kind of statutorily insupportable understatement. If the Commission's grant of hundreds of paired DTV channels on April 3, 1997 qualifies as a "modification" of existing licenses under Section 316, there appears to be very little the agency cannot do in the name of this broad "modification" authority.

B. Even If The Commission's Action Were A "Modification" Of Existing Licenses, The Agency And The Court Of Appeals Must Still Reconcile Section 308 With Section 316.

Both Section 308 and Section 316 address the Commission's authority to "modify" station licenses. Section 308 explicitly requires that, except in times of emergency or war, the Commission can grant modifications only upon "written application therefor received by it," while Section 316 does not expressly require a written application. *Compare* Pet. App. 30a *to* Pet. App. 32a. Faced with the

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2. It is no "relief," as respondents suggest, to permit petitioner the "flexibility to use analog channels for DTV." Opp. Br. 12. Petitioner only has one channel. Broadcasting to an audience unable to receive its transmission is, at best, an illusory benefit. Those licensees who have been granted a paired channel do not face that untenable choice and, by the time they return their second channels to the Commission, likely will have acquired a commanding position over their competitors.

question of which section applied to the Commission's action below, the court of appeals was not entitled (as respondents urge) merely to accept the Commission's disregard of Section 308 in favor of Section 316 as a "reasonable harmonization" of conflicting statutory provisions. Opp. Br. 9. Instead, the court of appeals had an obligation to read the two provisions in a manner that gives meaning to both and to the Communications Act as a whole, a standard of review even respondents acknowledge. *See* Opp. Br. 9 ("statutory provisions should be read by reference to the whole law" (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993)).

Petitioner offered a reading of Section 308 and Section 316 that gives meaning to both and suggests that Section 308, with its written application requirement, applied to the Commission's actions below. *See* Pet. 15-17 (Section 308 applies to modifications sought by or otherwise benefiting existing licensees, while Section 316 applies to actions by the Commission that restrict or negatively impact existing licenses). Under this reading, the Commission's grant of paired DTV channels constituted, at the very least, a beneficial "modification" to existing station licenses under Section 308, requiring written applications.[3]

Respondents do not address the merits of this reading, contending instead that the Court need not consider it because petitioner's reconciliation of the two statutory provisions was not presented or considered below. Opp. Br. 10. Petitioner respectfully submits that respondents take too narrow a view of the proceedings below. The question of whether the Commission's action qualified as a "modification" under

3. This reading is also consistent with the Commission's own action, since under the three-step procedure adopted by the agency for issuance of DTV licenses, broadcasters who were awarded a paired DTV channel were still required to submit written applications for them after the fact. Opp. Br. 5.

Section 316, rather than as a "modification" under Section 308, was squarely presented and considered by the court of appeals. Pet. App. 14a-15a. This alone would make review by this Court appropriate, even had petitioner never raised its argument prior to that decision. *E.g.*, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Here, petitioner has responded to the court of appeals' erroneous construction of Sections 308 and 316 by pointing out that the provisions must refer to different types of modifications in order to avoid the anomalous result that one provision in the statute essentially invalidates the other, without rational basis. Petitioner's proposed reconciliation of these provisions is not new argument; it is, at most, a further exposition of the same argument petitioner consistently has made below: Section 308 cannot be "read out" of the Communications Act under the guise of compliance with other provisions of the same statute. *Cf. Chase Manhattan Bank, N.A. v. American National Bank and Trust Company of Chicago*, 93 F.3d 1064, 1072 (2d Cir. 1996) (review appropriate where same basic argument advanced in district court is framed "in different terms" on appeal); *Dillon v. Duckworth*, 751 F.2d 895, 902 (7th Cir. 1985) (review permitted where party raised for the first time on appeal a "sub-issue[ ] of the main issue" presented below).[4]

4. Respondents also suggest that the court of appeals' interpretation of Section 316 raises no conflict among the circuits and, therefore, is not appropriate for certiorari. Opp. Br. 11. This Court may grant a petition for certiorari solely on the basis of a conflict within a single circuit and has done so in the past. *E.g.*, *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939). Moreover, the court of appeals' reading of Section 316 rests on premises that are inconsistent not only with a decision of a prior panel of the same court, but also with a decision of the U.S. Court of Appeals for the Ninth Circuit. Pet. 17. Both inconsistencies support review by this Court. *See Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (granting review in cases where there were both inter-circuit and intra-circuit conflicts).

Finally, the Commission's disregard of Section 308 is not, as suggested by the court of appeals, a reasonable application of Congress' direction regarding "eligible licensees" in Section 336(a)(1) of the Communications Act, 47 U.S.C. § 336(a)(1). Pet. App. 33a-34a. Section 336 did not, as respondents suggest (Opp. Br. 10), render superfluous the written application requirement of Section 308. In the first place, Congress is presumed to act with knowledge of existing law. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (" '[W]e assume that Congress is aware of existing law when it passes legislation.' " (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))). This is particularly true, where, as here, the new provision is incorporated into the pre-existing statute. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). There is no basis to believe that Congress' adoption of Section 336 was intended in any way to avoid the longstanding requirements of Section 308.

Secondly, that Congress limited the pool of those eligible for "initial DTV licenses" in Section 336 does not mean that every broadcaster who met the eligibility criterion was entitled to a license. The purposes of the application process — to examine the suitability of each applicant — remain valid and appropriate. Indeed, Congress *always* prescribes some criteria for eligibility for entitlements or approvals in the broadcast industry. *See, e.g.*, 47 U.S.C. § 310(a) and (b) (imposing limitations on foreign ownership of all broadcast licenses). To accept respondents' logic would require the conclusion that written application requirements should never apply in any of those circumstances.

II. THE COMMISSION WAS REQUIRED TO EXPLAIN ITS ACTIONS BELOW AND TO GIVE A "HARD LOOK" TO PETITIONER'S EVIDENCE OF AN AVAILABLE PAIRED DTV CHANNEL.

Lastly, respondents continue their refusal to adhere to the requirement, articulated by Judge Leventhal in *Wait Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), that the Commission must give a "hard look" to any allegations, supported by data, that a generally applicable rule made in the name of the "public interest" might, in particular cases, warrant exception. For the reasons described in the petition (Pet. 27-29), petitioner is entitled to consideration of its evidence that a paired digital channel can be awarded to it without undermining the DTV licensing scheme developed by the Commission, and to a clear explanation should the Commission determine that, notwithstanding this evidence, petitioner's application must be denied. Accordingly, at the very least, the Court should grant the petition, vacate the judgment below, and remand this matter with instructions that the Commission consider petitioner's evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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